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In The

Supreme Court of the United States

October Term, 1986

Immigration and Naturalization Service, *et al.*,

Petitioners,

v.

National Center for Immigrants' Rights, *et al.*,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

	Page
SUMMARY OF STATEMENT	1
STATEMENT	4
I. THE IMMIGRATION REFORM AND CONTROL ACT OF 1986 HAS ELIMINATED ANY IMPACT THE DECISIONS BELOW MAY HAVE HAD ON PETITIONERS' ABILITY TO REGULATE EMPLOYMENT	6
II. ENACTMENT OF THE IMMIGRATION REFORM AND CONTROL ACT OF 1986 MAKES IMPROVIDENT REVIEW OF THE PROPOSED QUESTION	9
III. THERE HAS BEEN NO SIGNIFICANT LITIGATION CONCERNING PETITIONERS' AUTHORITY TO CONDITION RELEASE ON BOND FOR 34 YEARS; THIS COURT HAS UNIFORMLY DENIED CERTIORARI IN CRIMINAL CASES PRESENTING ANALAGOUS ISSUES	10
IV. THE ISSUE PRESENTED BY THE FACTS IS NOT SIMPLY WHETHER PETITIONERS MAY SET BOND CONDITIONS PROHIBITING WORK, BUT WHETHER THE INS MAY INCARCERATE WITHOUT BOND ALLEGED, BUT UNPROVED, DEPORTABLE ALIENS SOLELY BECAUSE THEY NEED TO WORK	12
V. THE DECISIONS BELOW WERE CORRECTLY DECIDED AND ACCORD WITH SETTLED LAW	14
VI. CONCLUSION	17

TABLE OF AUTHORITY

Page

CASES

Canale v. United States, No. 87-1760, 53 U.S.L.W. 3911 (July 1, 1985) 11

C.M.K. v. Richardson Attorney General, 371 F. Supp. 183 (E.D. Mich. 1974) 13

Carlson v. Landon, 342 U.S. 524 (1952) 4

DeCanas v. Bica, 424 U.S. 351 (1976) 2

Gernstein v. Pugh, 420 U.S. 103 (1975) 13

Ingraham v. Wright, 430 U.S. 651 (1977) 13

INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) 6

INS v. Phinpathya, 464 U.S. 183 (1984) 17

Krzyske v. United States, No. 86-352, 86 U.S.L.W. 3558 (Nov. 17, 1986) 11

Liacakos v. Kennedy, 195 F. Supp. 630 (D.D.C. 1961) 13

Rippetoe v. Mississippi, No. 83-503, 52 U.S.L.W. 3386 (Nov. 14, 1983) 11

Schall v. Martin, 467 U.S. 253 (1984) 12

Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984) 2

United States v. Witkovich, 353 U.S. 194 (1957) 14

Whetstone v. INS, 561 F.2d 1303 (9th Cir. 1977) 13

Woodby v. Immigration & Naturalization Service, 385 U.S. 276 (1966) 5

Wong Yang Sung v. McGrath, 339 U.S. 33 (1950) 12

STATUTES AND REGULATIONS

Internal Security Act of 1950, § 2(15), 64 Stat. 987 14

TABLE OF AUTHORITY—Continued

Page

Immigration and Nationality Act of 1952, 8 U.S.C. 1101 *et seq.* 5

Immigration Reform and Control Act of 1986, P.L. 99-603 ..... *passim*

8 U.S.C. 1182(a)(14) 10

8 U.S.C. 1251(a) 4

8 U.S.C. 1252(a) 4, 5, 10

8 U.S.C. 1252(d)(3) 14

8 U.S.C. 1324A 6, 15

8 U.S.C. 1324A(a)(1), (2) 8

8 U.S.C. 1324A(e)(4) 7

8 U.S.C. 1324A(f) 8

8 U.S.C. 1324A(h)(2) 16

8 C.F.R. pt. 109 9

8 C.F.R. 109.1 10

8 C.F.R. 109.2 10

MISCELLANEOUS

Congressional Record, July 17, 1949, 10456 16

House Comm. on the Judiciary, H.R. Rep. No. 99-682, pt. 1, 99th Cong., 2d Sess. 58, *reprinted in* [1986] U.S. Code Cong. & Ad. News 5649 *et seq.* 16

United States Commission of Civil Rights, The Tarnished Golden Door: Civil Rights Issues in Immigration 90-91 (1980) 5

SUMMARY OF STATEMENT

A.

On November 6, 1986, five months after the Ninth Circuit Court of Appeals filed its decision, the President signed the Immigration Reform and Control Act of 1986. This legislation for the first time regulates the employment of aliens within the United States.

This development has the following implications:

1. The 1986 legislation fully regulates the employment of aliens through civil fines of up to $10,000 for each unauthorized worker knowingly hired and criminal penalties of up to six months imprisonment for employers who engage in a pattern or practice of violations. Any impact the decisions below *may* have had on petitioners' ability to regulate employment is now insignificant.

2. Petitioners have recently issued draft regulations implementing the 1986 legislation.[1] The draft regulations indicate that the agency contemplates significant changes in the employment authorization regulations as a result of the "employer sanctions" provisions of the new immigration law. The courts below ruled in part as they did because the challenged work authorization procedures failed to provide persons facing detention solely because of their need to work a due process hearing. Whether the courts below would bar no-work bond conditions set in accordance with the revised procedures will be known only

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[1] A copy of the draft regulations has been lodged with the Clerk of the Court. Petitioners have recently announced that proposed regulations are about to be published in the Federal Register.

if and when the regulations are published, challenged, and evaluated by lower courts.

3. At the time the courts below ruled, immigration law evinced " 'at best evidence of peripheral concern with the employment of illegal entrants.' " *National Center for Immigrants' Rights, Inc. v. INS*, 644 F.Supp. 5, 9 (C.D. Cal. 1985), *reprinted in* Petitioners' Appendix A at 9a-10a; *National Center for Immigrants' Rights v. INS*, 791 F.2d 1351, 1355 (9th Cir. 1984), *reprinted in* Petitioners' Appendix B at 22a, *quoting Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984), and *DeCanas v. Bica*, 424 U.S. 351, 360 (1976). Accordingly, they reasoned that detaining without bond every alleged alien unable to refrain from employment during deportation proceedings did not further a clearly declared legislative purpose.

In contrast, current legislation expressly regulates employment. Although respondents contend that bond conditions are still inappropriate to employment regulation, whether the courts below would hold today as they did prior to the 1986 legislation is uncertain.

B.

The issue presented by the facts is not simply whether petitioners' have statutory authority to use bond conditions to regulate employment. Although both the district and appellate courts reasoned that appropriate bond conditions tend to ensure appearance at administrative proceedings and availability for deportation, or protect the national security, the holdings of both courts rest on factual findings concerning petitioners' approach to bond conditions barring employment.

Among the findings of the district court: (1) The challenged regulations impose "a blanket [bond] condition which inherently precludes any individualized determination." *National Center for Immigrants' Rights, Inc. v. INS,* No. CV-83-7927, [Summary Judgment] Order, March 5, 1985, *reprinted in* Petitioners' Appendix B at 15a; and (2) delays before administrative review of "no-work" bond conditions often extended "several weeks." *National Center for Immigrants' Rights, Inc. v. INS,* No. CV-83-7927, *Order re Preliminary Injunction,* Dec. 16, 1983, *reprinted in* Petitioners' Appendix E at 47a-48a.

Even then, the hearing provided is, in petitioners' words, only an "informal proceeding" in which no testimony is taken and no record made. Reporters Transcript of December 16, 1983, at 130; Clerk's Record at 16. Although a released person may subsequently, only for "compelling reasons", apply for issuance of employment authorization, the evidence "clearly indicates that this review is not designed to comport with due process requirements." Petitioners' Appendix E at 48a.[2]

C.

Other than the case at bar, petitioners' setting of bond conditions unrelated to ensuring future presence at

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[2] Petitioners' dissatisfaction with the decisions below is largely with the accuracy of these factual findings. *E.g.,* Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit ["Petitioners' Brief"] at 19 ["the courts below have not accurately characterized the regulation as precluding individual determinations"]; *id.* at 25 ["The internal inconsistency in the opinions of both lower courts appears to result from several errors both factual and legal . . . [T]he regulation does not '[d]o away with individualized determinations' "].

administrative hearings or protecting national security has engendered *no* litigation in this Court for thirty-four years. Issues concerning bail conditions unrelated to ensuring the presence of criminal defendants have generally been insufficiently important to merit review by this Court. This case presents nothing to distinguish it.

D.

The decisions below are entirely consistent with the opinions of this Court. Detention without bail under the Internal Security Act was approved in *Carlson v. Landon,* 342 U.S. 524 (1952), to protect national security and only upon an individualized showing of Communist Party membership and indoctrination of others. 342 U.S. at 530. Petitioners' *blanket* imposition of no-work bond conditions goes far beyond *Carlson.* The record contains no evidence that the challenged regulations protect national security or that they bear any rational relationship to the stated purpose of preserving jobs for citizens.

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STATEMENT

Pursuant to 8 U.S.C. 1252(a), Immigration and Naturalization Service ("INS") agents arrest persons whom they suspect may be aliens within one of the classes of deportable aliens set out in 8 U.S.C. 1251(a).[3] Such per-

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[3] Persons are taken into custody upon probable cause they are (1) aliens and (2) deportable from the United States. This preliminary determination, often made by INS officers in an

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sons are generally entitled to release on bond pending administrative and judicial proceedings to determine whether they are deportable from the United States.[4]

In 1983, relying upon section 242(a) of the Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. section 1252(a), petitioners for the first time since enactment of the section some thirty years earlier, began admitting all arrested persons to bail only upon condition they not work. No due process hearing was held either before or after imposition of no-work bond conditions to determine whether an arrestee was in fact entitled to be in the United States or to work. Those who worked after release forfeited their bond and were re-incarcerated without bail.

Petitioners advance two reasons why their petition should be granted: First, they suggest that disallowing blanket no-work bond conditions presents an important

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atmosphere of "confusion and pandemonium," United States Commission on Civil Rights, The Tarnished Golden Door: Civil Rights Issues in Immigration 90-91 (1980), provides but minimal assurance that a person is either an alien or deportable. As recently stated by this Court, "Large numbers" of suspected deportable aliens "are often arrested at one time, and conditions [during INS arrest activities] are understandably chaotic." *INS v. Lopez-Mendoza*, 468 U.S. 1032 [104 S.Ct. 3479, 3487] (1984).

[4] A person may be only deported following a due process hearing at which the INS bears the burden of proving both alienage and deportability by "clear, unequivocal and convincing" evidence. *Woodby v. Immigration & Naturalization Service*, 385 U.S. 276, 286 (1966).

hinderance to their efforts to regulate such employment.[5] Second, they argue that the decisions below are wrong.

The importance of the question petitioners raise is addressed in sections I and II of this memorandum. Sections III and IV set out additional grounds why now granting the instant petition would be improvident. The merits of the decisions below are addressed in section V.

I.

THE IMMIGRATION CONTROL AND REFORM ACT OF 1986 HAS ELIMINATED ANY IMPACT THE DECISIONS BELOW MAY HAVE HAD ON PETITIONERS' ABILITY TO REGULATE EMPLOYMENT.

The Immigration Reform and Control Act of 1986 ["IRCA"], P.L. 99-603, posits sweeping revisions and additions to the INA, 8 U.S.C. 1101 *et seq.* Title I of the IRCA adds section 274A to the Immigration and Nationality Act. 8 U.S.C. 1324A. The new section is a comprehensive treatment of alien employment and for the first time makes unlawful the knowing employment of persons not authorized to work in the United States. 8 U.S.C.

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[5] Although the challenged regulation was ostensibly promulgated to protect the American labor force, petitioners failed to submit a single piece of evidence linking the challenged regulations to the protection of U.S. workers. On the other hand, respondents' "evidence tend[ed] to show that employment by aliens awaiting deportation proceedings does not affect American unemployment." *National Center for Immigrants' Rights, Inc., et al. v. Immigration and Naturalization Service, et al.*, No. 84-5504, Opinion, September 28, 1984, *reprinted in* Petitioners' Appendix D at 38a.

1324A(a)(1), (2).[6] The Attorney General advised Congress that through "employer sanctions" the "entry of illegal aliens into jobs" in the United States "can be addressed effectively." H.R. Report 99-682(I), 99th Cong. 2d Sess. 105 (1986).[7]

Employers who violate these restrictions face civil fines of up to $10,000. 8 U.S.C. 1324A(e)(4).[8] Contu-

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[6] (a) Making Employment of Unauthorized Aliens Unlawful——

(1) In general.—It is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States—

(A) an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3)) with respect to such employment, or

(B) an individual without complying with the requirements of subsection (b).

(2) Continuing Employment.—It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

[7] The legislative history of IRCA provides that "the [House Judiciary] Committee remains convinced that legislation containing employer sanctions is the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens." H.R. Rep. 99-682, *supra*, at 46.

[8] (4) Cease and desist order with civil money penalty for hiring, recruiting, and referral violations.—With respect to a violation of subsection (a)(1)(A) or (a)(2), the order under this subsection—

(A) shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of—

(Continued on following page)

macious violators are subject to criminal penalties and civil injunctions. 8 U.S.C. 1324A(f).[9]

Whereas bond conditions may previously have been of arguable value in controlling unauthorized employment, the new legislation directly and effectively regulates employment. Any contribution bond conditions may have

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(i) not less than $250 and not more than $2,000 for each unauthorized alien with respect to whom a violation of either such subsection occurred,

(ii) not less than $2,000 and not more than $5,000 for each such alien in the case of a person or entity previously subject to one order under this subparagraph, or

(iii) not less than $3,000 and not more than $10,000 each such alien in the case of a person or entity previously subject to more than one order under this subparagraph;

. . .

[9] (f) Criminal Penalties and Injunctions for Pattern or Practice Violations.—

(1) Criminal penalty.—Any person or entity which engages in a pattern or practice of violations of subsections (a)(1)(A) or (a)(2) shall be fined not more than $3,000 for each unauthorized alien with respect to whom such a violation occurs, imprisoned for not more than six months for the entire pattern or practice, or both, notwithstanding the provisions of any other Federal law relating to fine levels.

(2) Enjoining of pattern or practice violations.—Whenever the Attorney General has reasonable cause to believe that a person or entity is engaged in a pattern or practice of employment, recruitment, or referral in violation of paragraph (1)(A) or (2) of subsection (a), the Attorney General may bring a civil action in the appropriate district court of the United States requesting such relief, including a permanent or temporary injunction, restraining order, or other order against the person or entity, as the Attorney General deems necessary.

made—and the question petitioners propose—is now of little importance.[10]

II.

ENACTMENT OF THE IMMIGRATION CONTROL AND REFORM ACT OF 1986 MAKES IMPROVIDENT REVIEW OF THE PROPOSED QUESTION.

In February, 1987, petitioners released draft regulations implementing the IRCA. The draft regulations will add new part 245A to Title 8 of the Code of Federal Regulations. Much of 8 C.F.R. part 109—the procedural work authorization regulations found inadequate by the courts below—has been transferred to new part 245A.

Other than directing aliens not otherwise authorized to work to "apply for work authorization to the district

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[10] Even without the controls provided by the IRCA, the record below establishes that bond conditions are wholly ineffective in controlling unauthorized employment. Dr. Leo Chavez, a leading migration expert compared the contribution such conditions make toward protecting U.S. workers to "making a dam out of a bucket of sand and trying to stop all the rivers that flow to the ocean." Clerk's record 11 at 90. Dr. Patricia Kelly, an expert on labor migration, testified she knew of no evidence that bond conditions significantly decrease the unemployment of authorized workers. *Id.* at 124. She characterized the impact petitioners' regulations would have on unemployment as so speculative as to as amount to "throwing dice." *Id.* at 114, 116. Petitioners offered *no* evidence in the district court establishing any link between the challenged regulations and protecting the U.S. workforce.

Concurring, Congress did not include bond conditions among the IRCA employment controls, though the decisions of the courts below had been rendered prior to the enactment of the IRCA.

director . . . ," the draft indicates that employment authorization procedures are "to be developed."[11]

This case was decided as it was in part because petitioners lacked adequate, reasonably prompt procedures for adjudicating work authorization requests from persons whose bonds included automatic "no-work" conditions. The 1986 legislation has required sweeping changes to these procedures. Reviewing the propriety of superceded regulations would be academic, evaluating unknown future regulations, precipitous.

III.

THERE HAS BEEN NO SIGNIFICANT LITIGATION CONCERNING PETITIONERS' AUTHORITY TO CONDITION RELEASE ON BOND FOR 34 YEARS; THIS COURT HAS UNIFORMLY DENIED CERTIORARI IN CRIMINAL CASES PRESENTING ANALAGOUS ISSUES.

If the importance of an issue may be judged by the amount of litigation it engenders, petitioners' question is truly lacking.

The statutes concerning excluding aliens coming to the United States to work, 8 U.S.C. 1182(a)(14), and granting petitioners authority to set bond conditions, 8 U.S.C.

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[11] Draft regulations at 10. As for the criteria used in granting or withholding work authorization, the draft regulations retain only the first sentence of 8 C.F.R. 109.1(c), which sets standards for economic need. The remainder of the regulation, which provides for (1) granting work authorization requests on the basis of applicants' income statements and (2) revoking work authorization for false statements in income statements, is omitted. 8 C.F.R. 109.2, which also addresses revoking authorization, is omitted in its entirety.

1252(a), have existed for over thirty-four years, yet petitioners have cited *no* litigation over their authority to set bond conditions unrelated to ensuring detainees' presence at future hearings or protecting the national security.[12]

The dearth of litigation in the lower courts has provided few opportunities for this Court to decide whether to undertake plenary consideration of such issues. The closest analogy is to the Court's view of similar issues arising in criminal law.

In *Krzyske v. United States*, No. 86-352, the Court was asked to consider whether the Bail Reform Act, 18 U.S.C. 3142, authorizes courts to condition bail pending appeal on the defendant's filing tax returns and paying taxes due. 86 U.S.L.W. 3299 (Oct. 28, 1986). Certiorari was denied. 86 U.S.L.W. 3558 (Nov. 17, 1986).

In *Canale v. United States*, No. 84-1760, the Court declined to review inter-circuit conflicts over the Bail Reform Act's requirement that defendants who seek bail pending appeal show a substantial question likely to result in reversal or a new trial. 18 U.S.C. 3143(b)(2); 53 U.S.L.W. 3911 (July 1, 1985); *cf., Rippetoe v. Mississippi*, No. 83-503, 52 U.S.L.W. 3386 (Nov. 14, 1983) [whether Mississippi Supreme Court rules unconstitutionally deny bail; certiorari denied].

Bail conditions are more frequently litigated and affect far more persons in the criminal setting than in the

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[12] Petitioners suggest that the district court's treatment of this action as a class action is to blame for their being no other lower court decisions involving the issue they propose. At best, this argument accounts for but three of thirty-four years' inactivity.

immigration setting. Petitioners offer no reason why their question is nonetheless of greater importance.

IV.

THE ISSUE PRESENTED BY THE FACTS IS NOT SIMPLY WHETHER PETITIONERS MAY SET BOND CONDITIONS PROHIBITING WORK, BUT WHETHER THE INS MAY INCARCERATE WITHOUT BOND ALLEGED, BUT UNPROVED, DEPORTABLE ALIENS SOLELY BECAUSE THE NEED TO WORK.

Although petitioners cast the issue here as whether no-work conditions may be imposed at all,[13] the courts below clearly disapproved on the facts petitioners' "blanket" approach to setting such conditions.[14]

Petitioners must observe the requirements of due process imposed by the Fifth Amendment to the United States Constitution, particularly where they would deprive persons of personal liberty. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49-50 (1950). "If the 'liberty' protected by the Due Process Clause means anything, it means freedom from physical restraint." *Schall v. Martin*,

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[13] Elsewhere, petitioners contend that "the court of appeals and the district court . . . acknowledged that in some cases a 'no-unauthorized-work' condition on bond might be appropriate." Petitioners' Brief at 25.

[14] The Court of Appeals pointed out that "[e]arlier regulations and INS case law have required individualized determinations before the inclusion of a no-work condition in the bond." Petitioners' Appendix, at 10a.

467 U.S. 253 [104 S.Ct. 2403, 2423] (1984) (Marshall, J., dissenting); *Ingraham v. Wright,* 430 U.S. 651, 673-74 (1977).

As the district court found, however, under the disapproved regulations, "all aliens who [posted] bond [were] automatically subjected to the no-work condition." Petitioners' Appendix E at 49a. Moreover, "the delay between the earliest time the detainee could be released and a review of the bond condition by the Immigration Judge [varied] from a few hours to several weeks, largely depending upon the location of the hearing." *Ibid.* As noted above, Petitioners have conceded that the bond redetermination hearing is not a due process hearing.

Petitioners offer only that their blanket setting of no-work bond conditions "makes sound administrative sense . . ." Petitioners' brief at 16. Nonetheless, only a *compelling* governmental interest will justify infringing the right to be free from physical restraint. *Gernstein v. Pugh,* 420 U.S. 103, 113-14 (1975).

Importantly, persons arrested by the INS and required to appear in deportation hearings are often entitled to be and remain in the United States.[15] Incarcerating persons alleged, but unproved, to be deportable aliens entirely without due process must clearly be more than an administrative convenience.

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[15] *See, e.g., Whetsone v. INS,* 561 F.2d 1303 (9th Cir. 1977) (deportation reversed, respondent entitled to permanent resident alien status); *Liacakos v. Kennedy,* 195 F.Supp. 630 (D.D.C. 1961) (deportation order set aside, respondent a "natural born citizen of the United States"); *C.M.K. v. Richardson, Attorney General,* 371 F.Supp. 183 (E.D. Mich. 1974) (deportation order reversed, respondent a "derivative citizen of the United States").

V.

THE DECISIONS BELOW WERE CORRECTLY DECIDED AND ACCORD WITH SETTLED LAW.

Neither Congress nor this Court has ever sanctioned incarceration without bail as a means to regulate employment. Indeed, the only purpose for which such incarceration has been approved is to counter a "clear and present danger to the security of the United States . . ." Internal Security Act of 1950, § 2(15), 64 Stat. 987.

In *Carlson v. Landon, supra,* the Court narrowly approved detention without bail under the Internal Security Act of alien communists. The Court held such detention permissible because national security was at stake and it had been shown that the specific detainees were Communist Party members who had participated in the indoctrination of others. 342 U.S. at 541.

When national security is not threatened, however, neither this Court nor Congress has ever approved incarceration without bail of persons not accused or convicted of crime. Five years after *Carlson,* in *United States v. Witkovich,* 353 U.S. 194 (1957), the Court held that the "eloquently" broad language of 8 U.S.C. 1252(d)(3)[16]

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[16] Any alien, against whom a final order of deportation . . . has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision . . . (3) to give information under oath as to his nationality, circumstances, habits, associations and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; . . .

does not authorize the Attorney General to require aliens under *final order of deportation* to give information unrelated to ensuring their availability for deportation:

> When Congress did want to deal with the far-flung interest of national security or the general undesirable conduct of aliens, it gave clear indication of this purpose . . . [*I*]*t is a permissible and therefore an appropriate construction to limit the statute to . . . all questions reasonably calculated to keep the Attorney General advised regarding the continued availability for departure of aliens whose deportation is overdue.*

353 U.S. at 200-202 (emphasis added).[17]

Far from having indicated that bail conditions may be used to regulate employment, Congress has specifically sought to confine such regulation to the provisions of the 1986 legislation: "The provisions of this section [8 U.S.C. 1324A] preempt any State or local law imposing civil or criminal sanctions (other than through licensing and sim-

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[17] In support of their sweeping construction of section 242, petitioners quote language from one report in the legislative history of H.R. 10, 81st Cong., 1st Sess., stating that the Attorney General shall have "untrammeled discretion to impose such conditions or terms as he sees fit in releasing an alien under bond." Petitioners' Brief at 6.

Petitioners fail to cite other legislative materials that shed additional light on the scope of section 242. The language they argue authorizes detention without bail to control employment was offered for "one single purpose: the restoration of the sovereign power of our Government to deport criminal aliens . . ." Congressional Record, July 17, 1949, at 10456. Other than criminals, the debates over detention powers concerned "subversives." *Id.*, at 10449. Nowhere does the legislative history contemplate that persons other than criminals and subversives would be incarcerated without bail pursuant to section 242.

ilar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. 1324A(h)(2).

Although section 1324A(h)(2) does not expressly apply to federal agencies, it unquestionably embodies congressional concern that employment controls be limited to those prescribed by the IRCA. Underscoring this is that Congress preserved all collateral employment-related rights of unauthorized workers:

> It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law. . . .

House Comm. on the Judiciary, H.R. Rep. No. 99-682, pt. 1, 99th Cong., 2d Sess. 58, *reprinted in* [1986] U.S. Code Cong. & Ad. News 5649, *et seq.*

Although obvious that withdrawing employment-related rights from unauthorized workers could help deter proscribed employment, Congress preserved such rights, striking a balance between deterring *employers* from hir-

ing unauthorized workers and fully protecting the rights of *employees.*[18]

Going far beyond withdrawing employment-related rights, petitioners would abridge the personal liberty not of employers, but of employees, an approach plainly at odds with both the spirit and letter of the IRCA.

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VI.

CONCLUSION

Petitioners transparently argue that Congress simply hasn't done enough to control employment. Unwilling to settle for less than "untrammelled" authority to summarily deprive persons alleged, but unproved, to be deportable aliens of all personal liberty, petitioners propose a quantum leap from what Congress has authorized.

Petitioners' suggestion that this Court "construe the Act to broaden the Attorney General's discretion analogously would shift authority . . . from Congress to the INS and, eventually, as is evident from the experience in this case, to the courts. [The Court] must therefore reject [petitioner's] suggestion as impermissible in our tripartite scheme of Government." *INS v. Phinpathya,* 464 U.S. 183, 195 (1984).

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[18] With but few exceptions, Congress has never conditioned eligibility for any statutory benefits on refraining from unauthorized employment. *See, e.g.,* INA secs. 244, 245, 243(h), 8 U.S.C. secs. 1254, 1255, 1253(h).

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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